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U.S. COURT OF APPEALS

TO: PANEL AND ALL ACTIVE JUDGES

RE: PETITION FOR PANEL REHEARING WITH
PETITION FOR REHEARING EN BANC

SHORT TITLE : Landrigan v. Stewart
DOCKET NO.(s): 00-99011

() Memorandum ☒ Opinion () Order of 11/28/01
(date)

Panel Judges: Honorable Ferdinand F. FERNANDEZ
Honorable Pamela Ann RYMER
Honorable Kim McLane WARDLAW

Date circulated to the court 1/4/02

NOTE

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No. 00-99011

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN,

Petitioner-Appellant,

v.

TERRY L. STEWART, *et al.*,

Respondents-Appellees.

PETITIONER-APPELLANT'S PETITION FOR PANEL
REHEARING AND REHEARING *EN BANC*

On Appeal to the United States District Court
for the District of Arizona

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PETITIONER-APPELLANT'S PETITION FOR PANEL
REHEARING AND REHEARING *EN BANC*

Statement

Pursuant to Rules 35(b) and 40 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 35-1, Petitioner-Appellant Jeffrey Timothy Landrigan, f.k.a. Billy Patrick Wayne Hill ("Landrigan"), through undersigned counsel, respectfully requests the panel grant rehearing or the Court grant rehearing *en banc*.

Landrigan was found guilty of first degree murder and sentenced to death in

the state of Arizona.¹ His conviction and sentence were affirmed on direct appeal. *State v. Landrigan*, 176 Ariz. 1, 859 P.2d 111 (1993). [Excerpt of Record (“ER”) 63] Landrigan sought collateral review in the Arizona courts and requested funding for experts and an evidentiary hearing. The trial court denied the requests and denied relief. [ER 87] The state supreme court declined to review Landrigan’s petition for review. [ER 96] Landrigan then sought relief in the United States district court under 28 U.S.C. § 2254. The district court dismissed a number of the constitutional challenges as procedurally barred from habeas corpus review, [ER 104] and subsequently denied the remaining claims on the merits, along with Landrigan’s request for discovery and an evidentiary hearing. [ER 365] A panel of this Court (Fernandez, Rymer and Wardlaw, JJ.) affirmed the district court. *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001). [Addendum A]

The panel’s decision.

Under the algebra of the panel’s decision, it will be permissible to sentence a person to death not for what he did, but for who he is.

The panel decided this case with alacrity. A mere twenty days after oral

¹Landrigan was originally charged with second degree murder. [Excerpt of Record (“ER”) 6, 8] Prior to and throughout the course of the trial, the state made offers to Landrigan to plead to second degree murder. [ER 10, 34]

argument, the panel issued its opinion. The primary issue in this appeal was whether counsel was ineffective for failing to investigate for the sentencing phase of the trial. The panel agreed the investigation by trial counsel was weak. *Landrigan*, 272 F.3d at 1227-28. However, in reviewing the evidence trial counsel failed to discover -- evidence presented to the district court -- the panel chose to focus on only one component of the mitigating evidence: genetic predisposition to violence. *Id.* at 1228-29. The panel then concluded, "although Landrigan's new evidence can be called mitigating in some slight sense, it would also have shown the court that it could anticipate that he would continue to be violent." *Id.* at 1229.

The panel ignored other evidence of mitigation, namely Landrigan's *in utero* exposure to alcohol and other toxic substances, and early disruptive relations in his biological and adoptive families. This evidence, along with evidence of genetic predisposition, define Landrigan as having organic brain dysfunction. This is the root cause of Landrigan's neurobiological defects and psychological disorders. [ER 152, 153, 162]

The panel exempted Landrigan's trial counsel from conducting the kind of probing during the sentencing investigation mandated by the Supreme Court and a series of cases by this Court. Furthermore, the panel, by limiting its review and consideration to only a subset of mitigating evidence, ignored the recent holding in

Williams (Terry) v. Taylor, 529 U.S. 362, 397-98 (2000), requiring a reviewing court look to the totality of the evidence offered by a habeas petitioner. *See also Mayfield v. Woodford*, 270 F.3d 915, 928-29 (9th Cir. 2001)(*en banc*). Finally, the panel also misconstrued the evidence offered by Landrigan and inappropriately converted evidence of mitigation into evidence of aggravation. By doing this, the panel essentially legislated from the bench and created an aggravating factor not recognized under the Arizona death penalty statute.

Additionally, the panel declined to review the district court's findings regarding procedural default. This matter should be held in abeyance pending review of *Smith (Robert) v. Stewart*, 241 F.3d 1191 (9th Cir.) *cert. granted sub nom. Stewart v. Smith*, 534 U.S. ____; 2001 WL 1046998 (Dec. 12, 2001). The panel also denied Landrigan's claim that the Arizona sentencing scheme -- mandating that a judge rather than a jury make findings of fact as to the sentence -- is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Landrigan*, 272 F.3d at 1229-30. The Supreme Court is scheduled to conference this issue on January 4, 2002. *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001) *petition for cert. filed sub nom Ring v. Arizona*, (U.S. Sept. 18, 2001) (No. 01-488). If certiorari is granted, this matter should be held in abeyance pending resolution of *Ring*.

Reasons for granting the petition.

A. The panel admitted the investigation by trial counsel was less than robust, *Landrigan*, 272 F.3d at 1227-28, and little was presented at the sentencing hearing, yet it excused counsel's failures. *Id.* at 1224. The panel's finding is contrary to the requirements outlined in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, as well as a legion of decisions by this Court.

Trial counsel conducted virtually no investigation in preparation for the sentencing hearing. Counsel did talk to Landrigan's birth mother for about two hours, [ER 213] and spoke once to Landrigan's ex-wife over the telephone. [ER 46] Counsel also collected a few records pertaining to Landrigan. This was the extent of trial counsel's sentencing investigation.² At the sentencing hearing, counsel presented what little information he had not as evidence, but as a proffer which

²Counsel did not delegate his duty to investigate to others. *See Ainsworth v. Woodford*, 268 F.3d 868, 876 (9th Cir. 2001). The investigator assigned to the case spent a total of 13 hours on Landrigan's case, none of which in preparation for the sentencing phase. [ER 294-95] The psychologist retained by the trial lawyer interviewed Landrigan only once, at counsel's instruction, to "gain[] an impression of his personality and emotional status." [ER 298] Counsel did not supply the psychologist any relevant background information or documents pertaining to Landrigan except for a police report and forensic assessment form. [ER 178, 300] The psychologist's experience in working with the trial lawyer was different than his working relationships with lawyers in other death penalty cases. The psychologist concluded he "did not want to continue on the case under [these] conditions." [ER 300]

consumed eleven pages of the sentencing transcript. [ER 45-56]

Strickland and *Williams* squarely govern Landrigan's assertion that he was denied his constitutionally guaranteed right to the effective assistance of counsel due to the failure of his trial lawyer to investigate. In *Strickland*, the Court held "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Sixteen years later the Supreme Court ratified this mandate in *Williams*, finding "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396.

This Court has applied *Strickland* and *Williams* in numerous capital cases when trial counsel's investigation fell short of the constitutional mark. As a starting point, "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). When the grounds for not investigating have not been based upon tactical considerations, the Court has not hesitated to find deficient performance. *See Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir.1995).

The Court has found counsel ineffective when the lawyer "did not perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface." *Smith (Bernard) v. Stewart*, 140 F.3d 1263, 1269 (9th Cir.

1998)(Fernandez, J.). In this case, counsel did not conduct “the real probing for information” that is assumed or demanded by customary practice of a skilled lawyer. *Id.* Failing to present relevant information to experts, *Caro*, 165 F.3d at 1226, to follow the recommendations of mental health experts, *Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998), to examine records that are readily available, *Ainsworth*, 268 F.3d at 874, or to interview family members when there are indications of mental disorders, *Lambright v. Stewart*, 241 F.3d 1201, 1207 (9th Cir. 2001), renders counsel’s performance deficient. Similarly, failure to investigate a client’s mental condition is also egregious. *Smith (Robert)*, 241 F.3d at 1199; *Jackson v. Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000); *Caro*, 165 F.3d at 1226. Recently, this Court, *en banc*, unequivocally stated that trial counsel has an “obligation to conduct a thorough investigation of” a defendant’s background. *Mayfield*, 270 F.3d at 927-28 (quoting *Williams*, 529 U.S. at 396). Counsel must “as *Williams v. Taylor* requires, adequately investigate and prepare for the penalty phase or present and explain to the jury the significance of all the available mitigating evidence.” *Id.* at 928.

Here, the panel absolved Landrigan’s trial counsel for his failures. This holding is contrary to *Strickland*, *Williams*, and the recent opinion by this Court in *Mayfield*, and is a reason for the panel to rehear this matter or for the full Court to review the decision *en banc*.

B. Despite stating that it would “press on” and review the evidence of mitigation, *Landrigan*, 272 F. 3d at 1227, the panel did not. The panel ignored most of the evidence presented by Landrigan and restricted its consideration of mitigating evidence to genetic predisposition to violence. *Id.* at 1228-29.³ In this case, with all due respect, legal lenses were blinders. *Smith (Joe) v. Stewart*, 189 F.3d 1004, 1017 (9th Cir. 1999) (Fernandez, J., dissenting).

³Apparently, the panel limited its consideration of mitigating evidence to “genetic predisposition” based upon an affidavit filed by Landrigan in his state post-conviction proceedings. *Landrigan*, 272 F.3d at 1228. Paraphrasing Landrigan’s words, the panel wrote Landrigan “would have cooperated in the presentation of evidence on a single ground -- genetic predisposition.” *Id.* The panel’s characterization is not quite accurate, and requiring Landrigan to now affirmatively identify the information he would have allowed counsel to offer is a burden not previously required by this Court or any other court. It was error for the panel to limit its review to “genetic predisposition” based on Landrigan’s affidavit filed in the state post-conviction proceedings. A sentencer may not be precluded from considering relevant mitigating factors. *Lockett v. Ohio*, 438 U.S. 586 (1978). Landrigan has been unable to discover any other case where an appellate court limited its review to mitigating factors specified by a petitioner.

The panel also mischaracterized what actually occurred at the sentencing proceeding. A careful review of the transcript demonstrates that Landrigan did not “waive” mitigation. Rather, he instructed his mother and ex-wife not to testify. [ER 377, Supplemental Excerpt of Record (“SER”) 5 at 3]. Other evidence in the record belies the notion that Landrigan “waived” mitigation. He met with a psychologist. [ER 178] He allowed counsel to collect records, and to meet with his ex-wife and mother. [ER 46, 213] Landrigan did nothing to prevent his lawyer from conducting the necessary and required investigation. See *Jefferies v. Blodgett*, 5 F.3d 1180, 1197-98 (9th Cir. 1993) (Decision to forego the presentation of some mitigating evidence was a fully informed decision and part of the strategy); *Coleman v. Mitchell*, 268 F.3d 417, 450 (6th Cir. 2001).

No court -- at trial, in post-conviction or in habeas proceedings -- has heard testimony or reviewed the totality of the mitigating evidence concerning Landrigan. Some court, somewhere in the state or federal chain, must give Landrigan an "opportunity to develop a factual record on his Sixth Amendment claim." *Smith (Robert)*, 241 F.3d at 1198 (citing *Williams*, 529 U.S. at 393-98.) In spite of the mandate by this Court in *Mayfield* that it "must carefully weigh the mitigating evidence (both that which was introduced and that which was omitted or understated) against the aggravating evidence," 270 F.3d at 928 (parenthesis in original), *see also id.* at 919, n.1, the panel confined its consideration of the evidence of mitigation.

1. Landrigan's brain functions in such a way that it cannot control impulsive behavior and actually causes disordered behavior. Organic brain dysfunction resulted from factors outside of Landrigan's control. Genetics, *in utero* exposure to alcohol and other toxic substances, and early disruptive relations in his biological⁴ and adoptive families were the root causes of Landrigan's neurobiological

⁴Landrigan's birth mother gave him up for adoption when he was six months old. Landrigan's birth father, Darrel Hill, was incarcerated at the time. [ER at 226] Darrel Hill is now on death row in Arkansas and he has been diagnosed, *inter alia*, as "[s]chizophrenia, paranoid type." *Hill v. Lockhart*, 28 F.3d 832, 837 (8th Cir. 1994).

defects and psychological disorders.⁵ [ER 152, 153, 162.]

Contrary to the impression one may be left with after reading the panel's opinion, Landrigan did not argue that he was "genetically programmed to be violent." *Landrigan*, 272 F.3d at 1228. Rather, he stated evidence collected from his "biological family shows a significant genetic loading for Antisocial Personality Disorder."⁶ [ER 158] Instead of considering the extensive evidence of mitigation presented by Landrigan, the panel chose to focus only on "genetic predisposition" and concluded: "[o]n this record, assuring the court that genetics made him the way he is could not have been very helpful." *Landrigan*, 272 F.3d at 1229. Not only was

⁵This conclusion is based upon a thorough neuropsychological case study of Landrigan by Thomas C. Thompson, Ph.D. Dr. Thompson reviewed records related to Landrigan and his biological and adoptive families, including psychological, psychiatric, medical, educational, social, and criminal background material. Dr. Thompson conducted extensive interviews with Landrigan and members of his birth and adoptive families. Dr. Thompson surveyed the literature in the areas of forensic psychological evaluation, neuropsychological evaluation, and the effect of prenatal and early postnatal experience on later cognitive and behavioral outcomes. He also reviewed the behavioral genetic literature relevant to the issue of Antisocial Personality Disorder as well as drug and alcohol abuse. The review focused on the literature that was available at the time of the initial psychological consultation performed on Landrigan in 1990, as well as on current literature. Dr. Thompson conducted a two day clinical interview with Landrigan. In addition, over a three day period, Dr. Thompson performed a neuropsychological examination. [ER 144-62]

⁶Under Arizona law, this is a mitigating factor. *See Smith (Bernard)*, 140 F.3d at 1270 (Fernandez, J.).

it error for the panel to limit its review of the mitigating evidence, but its finding is contrary to a finding by an Arizona trial court which gave weight to the effect of a defendant's genetic history and imposed a life sentence. *State v. Eastlack*, No. CR-28677 (Pima Cty. April 11, 1997). [ER 301-309]

a. The panel was required to consider all of the evidence of mitigation presented by Landrigan. *Mayfield*, 270 F.3d at 919, n.1 (quoting *Williams*, 529 U.S. at 397-98). (“[T]he United States Supreme Court has said that, in reviewing ineffective assistance of counsel claims, we must ‘evaluate the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-in reweighing it against the evidence in aggravation.’”); *see also id.* at 928. Here, the panel only considered a portion of the mitigating evidence presented by Landrigan. Under *Williams v. Taylor*, it was error for the panel to do this.

b. The panel cited *Mobley v. Head*, 267 F.3d 1312 (11th Cir. 2001), and *People v. Franklin*, 167 Ill.2d 1, 656 N.E.2d 750 (1995), for the proposition that Landrigan's “genetic predisposition” “theory was rather exotic at the time, and still is.”⁷ *Landrigan*, 272 F.3d at 1228, n.4. Inexplicably, the panel ignored *Eastlack* and

⁷In *Mobley*, 267 F.3d at 1318, and *Franklin*, 167 Ill.2d at 26-28, 656 N.E.2d at 761-62, counsel conducted a thorough investigation for sentencing and presented the evidence at the sentencing hearings. In *Mobley*, the appellant argued counsel was ineffective for putting forward “a genetic deficiency theory without the benefit of an expert in genetics.” 267 F.3d at 1318. The court found the decision to be strategic.

the evidence offered by Landrigan that this “theory” was not novel in the scientific community. [ER 157, 172-76]

Studies in the United States, Denmark and Sweden dating back to 1983 [ER 157] support Landrigan’s reliance on “genetics” as part of his evidence of mitigation. It may be that the law has not caught up to the science. Rather than be dismissive of the evidence offered by Landrigan as “exotic,” a more appropriate resolution would have been to remand the case to the district court for a hearing so the evidence offered by Landrigan could be further developed. In turn, the panel could have had a full record before deciding such a complex, evolving issue.

In *State v. Eastlack*, the sentencing judge considered “[t]he effect of the defendant’s genetic history” as a non-statutory mitigating factor. [ER 304] The combination of “genetic history and fetal alcohol effect” demonstrated that the defendant had a “limited ability to comprehend cause and effect,” had “impaired judgment,” and a lack of “control over behavioral responses,” and imposition of the

Id. In *Franklin*, the evidence appellant sought to offer was cumulative evidence of family members that there was a history of violence in the family. 167 Ill.2d at 27, 656 N.E.2d at 761. The evidence offered in *Mobley* and *Franklin*, and the context in which it was offered, is quite different than the evidence presented by Landrigan. In addition, in *Franklin*, the court determined the evidence offered by the appellant could show “future dangerousness.” Ill. 2d at 27, 656 N.E.2d at 761. Unlike Illinois, Arizona does not list “future dangerousness” as an aggravating factor. See Argument C *infra*.

death penalty was not appropriate. [ER 304-05] The evidence of mitigation presented by Landrigan was quite similar to that presented by Eastlack. One difference however is that Eastlack had an opportunity to fully present his evidence at a hearing. Landrigan did not.

2. Landrigan has been diagnosed as suffering from organic brain dysfunction. [ER 152, 153, 162] This means he has a neurobiological defect and personality disorders. This expert finding has not been challenged with evidence to the contrary. This Court has previously found prejudice when a habeas petitioner has offered medical or psychological evidence to support a claim of ineffective assistance of counsel. *See e.g. Mayfield*, 270 F. 3d at 927-28 (drug abuse and diabetes); *Ainsworth*, 268 F.3d at 878 (troubled background and emotional instability); *Jackson*, 211 F.3d at 1163 (signs of mental illness in childhood; failure to present medical evidence at sentencing); *Smith (Joe)*, 189 F.3d at 1013-14 (serious mental illness); *Caro*, 165 F.3d at 1226 (evidence of organic brain dysfunction); *Bean*, 163 F.3d at 1079 (brain damaged); *Smith (Bernard)*, 140 F.3d at 1270-71 (Fernandez, J.) (antisocial personality disorder and sociopathic); *Clabourne v. Lewis*, 64 F.3d 1373, 1384-87 (9th Cir.1995) (schizophrenia). In other cases, when this type of evidence was introduced, the Court has remanded the matter to the district court for an evidentiary hearing. *See e.g. Lambright*, 241 F.3d at 1207-08 (emotional illness);

Smith (Robert), 241 F. 3d at 1199 (brain damage and mental disorder); *Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir. 1999) (psychosis and alcoholism genetically passed from parents to children; organic brain damage); *Correll v. Stewart*, 137 F.3d 1404, 1413-14 (9th Cir 1998) (mental health history and personality disorder).

Under *Strickland*, Landrigan was required to demonstrate by less than a preponderance of the evidence that the sentence is unreliable and the sentencing proceedings unfair. 466 U.S. at 694. The finding by the panel, in light of the facts and evidence presented by Landrigan, is unreasonable.

C. In Arizona, a judge may impose a death sentence only if it finds one or more of the enumerated statutory aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. Ariz. Rev. Stat. § 13-703(F). The statute does not allow consideration of non-enumerated aggravating factors. Ariz. Rev. Stat. § 13-703(G) (stating that “the court shall consider the following aggravating circumstances”); (cf. 720 Ill. Comp. Stat. § 9-1(c) (2001) (stating that “[a]ggravating factors may include but need not be limited to those factors set forth in subsection (b)”). See Argument B(1)(b), *supra*).

The panel converted the mitigating evidence offered regarding Landrigan’s biological and genetic background from a shield into a sword by saying that the evidence would have shown “the [trial] court that it could anticipate that he would

continue to be violent.” *Landrigan*, 272 F.3d at 1229. The panel’s conversion was erroneous because “future dangerousness” is not one of Arizona’s ten enumerated statutory aggravating circumstances, and must therefore be rejected as not statutorily authorized under Arizona law. *See State v. Shackart*, 190 Ariz. 238, 250, 947 P.2d 327 (Ariz. 1997) (“The trial court can give weight only to evidence that tends to establish an aggravating circumstance in A.R.S. § 13-703(F)”); *see also State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995); *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1,13 (1983); *State v. Madson*, 125 Ariz. 346, 353, 609 P.2d 1046, 1053 (1980); *State v. Lujan*, 124 Ariz. 365, 373, 604 P.2d 629, 637 (1979); *State v. Clark*, 126 Ariz. 428, 435, 616 P.2d 888, 895 (1980); *Zant v. Stephens*, 462 U.S. 862, 888 (1983).

Capital case jurisprudence has long been clear on the notion that “defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal citation omitted). Arizona law prohibits the use of non-statutory aggravating circumstances such as “future dangerousness” for precisely that reason -- so a capital defendant like Landrigan is able to present mitigating evidence of emotional and mental problems that diminish his blameworthiness for his crime without fear that such evidence will

be turned against him through use of a non-statutory aggravating circumstance like hypothetical notions of “future dangerousness.”

D. Landrigan challenged the district court’s findings of procedural default. *See* Motion for Certificate of Appealability, May 11, 2000 at 46. Landrigan argued to the district court that he overcame the procedural bar because “the constitutional violations were reviewed by the state supreme court in its fundamental error review or independent review of Landrigan’s conviction and sentence.” Despite the issuance of a certificate of appealability on a similar question, *see Moormann v. Stewart*, No. CIV 91-1121-PHX-ROS (D. Ariz. Sept. 29, 2000)(Order granting Certificate of Appealability) at 3 [Addendum B], the panel declined to review this claim. Order, Oct. 18, 2001. In addition, Landrigan requested a limited remand from the panel in light of the Court’s decision in *Smith (Robert) v. Stewart*. Motion for Limited Remand and Stay and Abeyance, Mar. 30, 2001. Landrigan argued the district court found all or parts of ten claims procedurally barred and would not be reviewed on the merits, and he took issue with the district court’s findings concerning sentencing issues. The panel denied Landrigan’s motion. Order, Oct. 18, 2001.

The Supreme Court granted certiorari in *Smith. Stewart v. Smith*, 2001 WL 1046998. The Supreme Court then certified a question to the Arizona Supreme Court to “help determine the proper state-law predicate for our determination of the federal

constitutional questions raised in this case.”⁸ *Id.* The Supreme Court’s resolution of *Smith* may have an impact on Landrigan’s case.

Finally, the Supreme Court is scheduled to conference *Ring v. Arizona* on January 4, 2002. If certiorari is granted, this matter should be held in abeyance pending resolution of the question in *Ring*.⁹

Landrigan respectfully requests that the panel or the Court hold this matter in abeyance and withhold issuance of the mandate pending a decision by the Supreme Court in *Smith* and *Ring*.

Conclusion.

The panel, contrary to *Williams v. Taylor* and *Mayfield v. Calderon*, limited its review of the mitigating evidence offered by Landrigan. Also, when the panel limited the evidence to “genetics,” it absolved Landrigan’s trial counsel for his failures. The panel then, without authority, converted the limited evidence it considered to aggravation, thus creating a new, non-statutory aggravator not recognized under Arizona law. Under the formula created by the panel, a person may now be sentenced to death because of who he is, not for what he did. This holding is contrary to

⁸The certified question is reprinted at Addendum C.

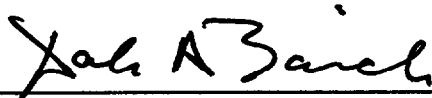
⁹The question before the Supreme Court in *Ring* is reprinted at Addendum D.

Strickland, Williams, Lockett, the recent *en banc* opinion by this Court in *Mayfield*, and a line of decisions by this Court.

Jeffrey Landrigan is under a sentence of death. In order to prevent an injustice and provide evenhandedness in the application of constitutional protections and decisions by the Supreme Court and this Circuit, the panel should grant Landrigan's petition for rehearing, or alternatively the Court should grant his petition for rehearing *en banc*.

Respectfully submitted this 3rd day of January, 2002.

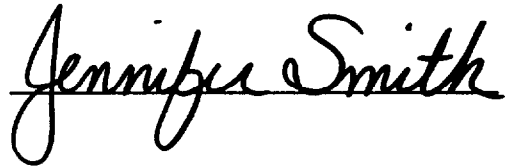
Fredric F. Kay
Federal Public Defender
Dale A. Baich
Sylvia J. Lett

By 
Counsel for Petitioner-Appellant

**Certification Pursuant to FRAP 32(a)(7)(c), Circuit Rule 32-1
and Circuit Rule 40-1(a) for case number 01-99000**

Pursuant to FRAP 32(a)(7)(c), Ninth Circuit Rule 32-1 and Ninth Circuit Rule 40-1(a), I certify that the petition for panel rehearing and rehearing *en banc* is proportionately spaced, has a typeface of 14 points and contains 4,166 words.

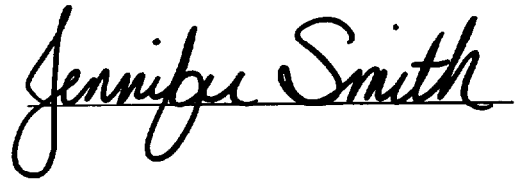
January 3, 2002

A handwritten signature in black ink that reads "Jennifer Smith". The signature is written in a cursive style with a horizontal line underneath the name.

Certificate of service

The undersigned hereby certifies that on the 3rd day of January 2002, this petition was sent by Federal Express to the Court and two copies were mailed to:

James P. Beene
Assistant Attorney General
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007-2997

A handwritten signature in cursive script, reading "Jennifer Smith", written over a horizontal line.

Addendum A

272 F.3d 1221

1 Cal. Daily Op. Serv. 9936, 2001 Daily Journal D.A.R. 12,412

(Cite as: 272 F.3d 1221, 2001 WL 1504448 (9th Cir.(Ariz.)))

<KeyCite History>

United States Court of Appeals,
Ninth Circuit.

Jeffrey Timothy LANDRIGAN, a.k.a.
Billy Patrick Wayne Hill,
Petitioner-Appellant,
v.

Terry STEWART, Director, Arizona
Department of Corrections,
Respondent-
Appellee.

No. 00-99011.

Argued and Submitted Nov. 8, 2001
Filed Nov. 28, 2001

After his murder conviction, and sentence of death, were affirmed on direct appeal, 176 Ariz. 1, 859 P.2d 111, and his state postconviction petitions were unsuccessful, petitioner sought federal habeas corpus relief. The United States District Court for the District of Arizona, Roslyn O. Silver, J., denied petition. Petitioner appealed. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) counsel for petitioner was not ineffective in failing to present mitigating evidence during penalty

phase, in light of petitioner's adamant refusal to allow such evidence to be presented; (2) any deficient performance in failing to investigate and produce additional mitigating evidence was not prejudicial; and (3) error by trial court in failing to consider capital defendant's alleged intoxication and past history of drug use as a nonstatutory mitigating factor was cured by Arizona Supreme Court on direct appeal.

Affirmed.

West Headnotes

[1] Habeas Corpus k842
197k842

Court of Appeals reviews a district court's decision to deny a habeas corpus petition de novo. 28 U.S.C.A. § 2254.

[2] Criminal Law k641.13(1)
110k641.13(1)

To obtain relief based on ineffective assistance of counsel, defendant must show both that counsel was not

functioning as the counsel guaranteed by the Sixth Amendment, and that the deficiency prejudiced him. U.S.C.A. Const.Amend. 6.

[3] Criminal Law k641.13(1)
110k641.13(1)

To establish deficient performance by counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

[4] Criminal Law k641.13(1)
110k641.13(1)

In determining whether counsel's performance fell below an objective standard of reasonableness, and thus will support ineffective assistance of counsel claim, court must be highly deferential, avoid the distorting effects of hindsight, and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. U.S.C.A. Const.Amend. 6.

[5] Criminal Law k641.13(1)
110k641.13(1)

For counsel's deficient performance to result in prejudice warranting relief, counsel's errors must have been so serious as to deprive the defendant of a fair trial, or a trial whose result is

reliable; this in turn means that there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and that the unprofessional errors were egregious enough to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

[6] Criminal Law k641.13(7)
110k641.13(7)

Rules governing ineffective assistance of counsel claims apply to the death penalty phase of a prosecution. U.S.C.A. Const.Amend. 6.

[7] Criminal Law k641.13(1)
110k641.13(1)

Reasonableness of counsel's actions, for purposes of ineffective assistance of counsel claim, may be determined or substantially influenced by the defendant's own statements or actions. U.S.C.A. Const.Amend. 6.

[8] Criminal Law k641.13(7)
110k641.13(7)

Counsel for capital murder defendant was not ineffective in failing to present mitigating evidence on behalf of defendant at penalty phase hearing, where defendant adamantly informed counsel, who had subpoenaed

members of defendant's family and sought to present their testimony, that he did not want any mitigating evidence presented, and did not merely recede into silence, but took an actively aggressive posture to defeat any efforts by counsel to present mitigation evidence, by making statements that made matters even worse every time counsel attempted to place mitigating factors before court. U.S.C.A. Const.Amend. 6.

[9] Criminal Law k641.13(7)
110k641.13(7)

Claimed ineffectiveness of counsel for capital murder defendant in failing to adequately investigate and develop potential mitigating evidence was not prejudicial, where defendant adamantly insisted during trial, notwithstanding counsel's protests, that mitigating evidence counsel had obtained not be presented, and it was not reasonably probable that, had counsel developed additional mitigating evidence, result would have differed, since defendant's subsequent statements indicated that he would have cooperated in presentation of mitigating evidence only with respect to single ground of genetic predisposition, success of which would have been highly doubtful. U.S.C.A. Const.Amend. 6.

[10] Habeas Corpus k753
197k753

District court did not abuse its discretion by limiting expansion of record in connection with federal habeas corpus petition, where court did allow significant expansion of record, and petitioner did not why additional evidence was relevant and would have affected the outcome. 28 U.S.C.A. § 2254.

[11] Habeas Corpus k751
197k751

District court did not abuse its discretion in determining that an evidentiary hearing was not required in connection with federal habeas corpus petition filed by death row prisoner. 28 U.S.C.A. § 2254.

[12] Jury k31.1
230k31.1

[12] Sentencing and Punishment
k1626
350Hk1626

Fact that Arizona capital sentencing scheme allows a judge, rather than a jury, to decide the sentencing issue does not render scheme unconstitutional. A.R.S. § 13-703.

[13] Courts k96(3)

106k96(3)

Lower federal courts must leave it to the Supreme Court to overrule its own cases, if and when it decides to do so.

[14] Habeas Corpus k508
197k508

Error by trial court in failing to consider capital defendant's alleged intoxication and past history of drug use as a nonstatutory mitigating factor after it rejected them as a statutory mitigating factor, as required under Arizona law, was cured by Arizona Supreme Court when it reweighed factors on appeal, and thus did not provide basis for federal habeas corpus relief. 28 U.S.C.A. § 2254.

[15] Habeas Corpus k508
197k508

Inclusion in presentence report (PSR) of statement by victim's brother that defendant deserved the death penalty, and statement by police officer that he believed defendant should receive a maximum sentence did not affect fairness of capital sentencing proceeding, and thus, habeas relief was not warranted, where there was absolutely no reason to believe that sentencing judge was influenced or otherwise diverted from her task by opinion statements in question.

***1223** Dale A. Baich, Assistant Federal Public Defender, Phoenix, Arizona, for the petitioner-appellant.

James P. Beene, Assistant Attorney General, Phoenix, Arizona, (argued); Joseph T. Maziarz, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellee.

Appeal from the United States District Court for the District of Arizona; Roslyn O. Silver, District Judge, Presiding. D.C. No. CV-96-02367-PHXROS.

Before: FERNANDEZ, RYMER, and WARDLAW, Circuit Judges.

FERNANDEZ, Circuit Judge:

****1** Jeffrey Timothy Landrigan was convicted of the murder of Chester Dean Dyer in the state of Arizona and was sentenced to death. His conviction was affirmed by the Supreme Court of Arizona on direct review, his state petition for post-conviction relief was denied by the state courts, and his petition for habeas corpus under 28 U.S.C. § 2254 was denied by the district court. He appealed and his primary claim is that counsel was ineffective at sentencing. We affirm.

BACKGROUND

In early November of 1989, Landrigan was incarcerated in an Oklahoma Department of Corrections Facility. He was serving a term of 20 years imprisonment [FN1] for the murder of his "best friend," Greg Brown; he had stabbed Brown to death in 1982, and had been in prison since then. While in custody, Landrigan had not been quiescent. He had an argument with another prison inmate and repeatedly stabbed him, a crime for which Landrigan was convicted in March of 1986.

FN1. His sentence was actually 40 years, but 20 years of it had been suspended.

Alas, on November 10, 1989, Landrigan escaped from custody in Oklahoma, and soon surfaced in Phoenix, Arizona. Within a month, he had met the victim, Chester Dean Dyer, a homosexual man who often tried to pick up other men by flashing a wad of money. On December 13, 1989, Landrigan went to Dyer's apartment where the two of them drank beer, and had other pleasurable interactions. In fact, the situation was so friendly that Dyer called another friend to tell him about it, and even asked that friend if he could get Landrigan a job. The friend then spoke with Landrigan about that

possibility.

Thereafter, Landrigan slew the victim by strangling and stabbing him. Dyer's body was found two days later and the Arizona Supreme Court described the murder scene in the following way:

[Dyer] was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

Arizona v. Landrigan, 176 Ariz. 1, 3, 859 P.2d 111, 113 (1993) (*Landrigan*). It only remains to add that an ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped on Dyer's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and there were drops of blood on the bedding, the kitchen sink and the bathroom counter top.

*1224 Landrigan was soon caught, and was prosecuted for first degree murder and other crimes, convicted in a jury trial, and ultimately sentenced to death by the trial judge, who found aggravating circumstances, but

insufficient mitigating circumstances to outweigh them. She opined that although the crime was not out of the ordinary as first degree murders go, Landrigan was. As she put it:

****2** I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

Landrigan appealed to the Arizona Supreme Court and raised a number of issues, including improper imposition of the death sentence and ineffective assistance of counsel at and before sentencing. That court affirmed. *See id.* at 8, 859 P.2d 111, 859 P.2d at 118.

Landrigan then filed a petition in the Arizona Superior Court for post-conviction relief in which he, again, asserted ineffective assistance of counsel because of counsel's failure to present mitigating evidence. The post-conviction judge, who had been the trial judge, denied post-conviction relief; the Arizona Supreme Court

denied review. Landrigan then filed his present petition for habeas corpus relief in the district court. It, too, denied relief, and this appeal ensued.

STANDARD OF REVIEW

[1] We review the district court's decision to deny a 28 U.S.C. § 2254 habeas corpus petition de novo. *See Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir.2000). Because Landrigan filed his petition after April 24, 1996, it is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1). To obtain habeas corpus relief under the AEDPA, Landrigan must show that the state courts' denial of his ineffective assistance of counsel claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*

DISCUSSION

A. *Ineffective Assistance of Counsel*

Landrigan's principal claim is that he had ineffective assistance of counsel at his penalty phase hearing because counsel failed to present mitigating evidence. Certainly, Landrigan is

entitled to have mitigating evidence presented on his behalf; certainly, little was presented here. Were that all there was to say, this might have been a relatively easy case for reversal; as it is, the opposite conclusion is called for. The standards we must use are well known, and we will but synopsise them before turning to the circumstances of this case. [FN2]

FN2. The next four paragraphs of this opinion are quoted from *Smith v. Stewart*, 140 F.3d 1263, 1268-69 (9th Cir.1998). For ease of reading, they are not indented or shown with any quotation marks that are not already contained in *Smith* itself.

[2] We must decide whether counsel was ineffective based on the now familiar factors set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to obtain relief, [Landrigan] must show both that counsel "was not functioning*1225 as the 'counsel' guaranteed ... by the Sixth Amendment," and that the deficiency prejudiced him. *Id.* at 687, 104 S.Ct. at 2064.

**3 [3][4] The first factor requires

the defendant to show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. And in determining whether it did, we must be "highly deferential," avoid "the distorting effects of hindsight," and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2065.

[5] The second factor requires that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. That in turn means that there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. And that in turn means that the unprofessional errors were egregious enough "to undermine confidence in the outcome." *Id.*; see also *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir.1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir.1995).

[6] Of course, all of these rules apply to the death penalty phase of a prosecution. *Strickland* itself was a murder prosecution, and the Supreme Court did apply its rules to the death

penalty part of the case. *See* 466 U.S. at 698-701, 104 S.Ct. at 2070-71; *see also, Clabourne*, 64 F.3d at 1378.

Counsel did present some mitigating evidence in his sentencing memorandum to the trial court, which included medical documents regarding Landrigan's juvenile alcoholism and use of drugs. A different and difficult situation confronted counsel at sentencing because Landrigan refused to have mitigating evidence presented to the court. At the outset, counsel explained to the court that he had two family members present, but that they had refused to testify on Landrigan's behalf. When the court asked why, counsel said:

Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.

I have advised him and I have advised him very strongly that I

think it's very much against his interests to take that particular position.

****4** Landrigan did not controvert that statement. In fact, the court decided to question him, and the following dialogue ensued:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish him to bring any mitigating circumstances to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

Landrigan's position could hardly have been more plain.

[7][8] Courts have been somewhat cautious when dealing with an ineffectiveness claim based upon a client's demand that a ***1226** certain course of action not be pursued, even if it might be to his benefit. In *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066, the Supreme Court did comment that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." That does not quite say that

the defendant absolutely controls the situation. A similarly strong, yet hedged, statement was made by the Eleventh Circuit where it stated that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made," *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir.1985), but went on to state that counsel investigated anyway and "did not blindly follow" his client's directions, *id.* at 890. We have taken a substantially similar approach. Thus, we have said that counsel was not ineffective when he failed to present mitigating evidence after his client directed him not to do so. *Jeffries v. Blodgett*, 5 F.3d 1180, 1197-98 (9th Cir.1993). We did note, however, that counsel was prepared to present the evidence, and that the client had made a knowing and intelligent decision which precluded that. *Id.* at 1198. On the other hand, we have also stated that the lack of discovery and presentation of mitigating evidence could not be laid at counsel's feet where the client, "fired his attorneys precisely because they wanted to gather and introduce mitigating evidence on his behalf." *Moran v. Godinez*, 57 F.3d 690, 700 (9th Cir.1994). And in a case where a defendant was "determined and unequivocal" in his decision to plead guilty and seek the death penalty, we

opined that counsel's failure to offer additional advice and obtain a defense psychiatrist did not show ineffective assistance. *Langford v. Day*, 110 F.3d 1380, 1388 (9th Cir.1996). More recently, in a case where an attorney's decision regarding the presentation of certain evidence appeared to have been influenced by his client's wishes, we rather blandly opined that "[w]e believe that when the competence of a lawyer's tactical or strategic decision is being reviewed, the lawyer is entitled to an additional measure of deference if he acts in conformity with the client's wishes." *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir.2001).

Perhaps the best synthesis of the above authorities is that it all depends. We do have to give deference to counsel's choices and determinations, but our ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies.

****5** Landrigan was not willing to

merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.

In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself *1227 and unfortunately killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed

him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working ... at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in

Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

****6** Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

In effect, then, the record shows that counsel was able to get some mitigating evidence before the trial court. That court knew about Landrigan's past history of difficulty with drugs and alcohol, and did hear of the more benign explanations of Landrigan's behavior that we have outlined, although it also heard Landrigan's "corrections" of that information. In addition, it knew that had counsel been able to elicit evidence at the hearing, he would have sought a continuance to obtain

expert evidence to further support the case for mitigation. The trial judge expressed no problem with that approach and, indeed, seemed amenable to it. Thus, it appears that the investigation was not necessarily over just because the sentencing hearing had commenced; it was, however, then truncated because of Landrigan's refusal to allow evidence to be presented at that hearing. Nevertheless, we do not hold that Landrigan's statements foreclose us from any further exploration of the circumstances. Rather, as we have done in other cases, we press on.

[9] Landrigan argues that the record does not demonstrate that counsel's investigation of the case up to the point of the sentencing hearing itself had been very robust. We agree that from what we now have before us the investigation appears to have been rather asthenic. In another case, we might well say it was prejudicially asthenic. *See Ainsworth v. Woodford*, 268 F.3d 868, 878 (9th Cir.2001) (emotional and *1228 mental history and other background has to be developed); *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999) (childhood background must be developed); *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir.1998) (sufficient information must be given to experts); *Clabourne*, 64 F.3d at

1384 (mental history must be developed). Here, however, given Landrigan's apparently adamant insistence that mitigating evidence not be presented, it can reasonably be said that any deficiency in counsel's investigation could not have been prejudicial. On the other hand, it can also be said that if the investigation had been more thorough, Landrigan would have had more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented. Perhaps he would not have dealt with all other evidence in the way he dealt with the evidence that was presented; perhaps in some respect he would have tried to make the gloom surrounding him somewhat less inspissate.

What would he have done? For that we must again turn to Landrigan himself. Over four years after his sentencing, and even now, Landrigan's only personal declaration indicates that he would have cooperated in presentation of evidence on a single ground--genetic predisposition. As he put it "had trial counsel raised that aspect with him, [he] would have cooperated." If we take Landrigan at his word, [FN3] we must consider whether it is reasonably probable that use of that theory would have produced a different result. *See*

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. We must ask if its absence undermines our confidence in the outcome. *See Smith*, 140 F.3d at 1268. It does not.

FN3. The state courts did not do so. The state post-conviction judge, who was the sentencing judge also, said "Again, the defendant's statements at sentencing belie his new-found sense of cooperation."

****7** That theory was rather exotic at the time, and still is. [FN4] It suggests that Landrigan's biological background made him what he is. Even had counsel been permitted by Landrigan to submit the genetic violence theory, given the other evidence before the sentencing court, we are satisfied that the result would not have been affected. We recognize that it is parlous indeed to predict what will affect a trial judge at sentencing. *See Smith*, 140 F.3d at 1270. Yet, there are times when we can confidently say that there would have been no difference in the result. This is one of those times.

FN4. *See Mobley v. Head*, 267 F.3d 1312, 1318 (11th Cir.2001) (not ineffective to present genetic disposition

theory to jury); *Turpin v. Mobley*, 269 Ga. 635, 642-45, 502 S.E.2d 458, 465-67 (1998) (same).

The murder here, while vile enough, was not itself so vile and exceptional that "it was highly improbable that mitigating factors of any ordinary stripe would help." *Id.* at 1271; see also *Gerlaugh v. Stewart*, 129 F.3d 1027, 1042-43 (9th Cir.1997); *Bonin v. Calderon*, 59 F.3d 815, 836 (9th Cir.1995). However, as the Arizona courts pointed out, the murderer himself *was* exceptional; exceptionally unscrupulous; exceptionally lacking in regard for others; exceptionally lacking in morals.

It is highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, [FN5] violent killer because he was genetically programmed to be violent, as shown by the *1229 fact that he comes from a family of violent people, who are killers also. When faced with a similar claim about counsel's failure to present a family history of mental illness and violence, "including the fact that [the defendant's] father had murdered someone," the Illinois Supreme Court opined that there was no reasonable probability that the

sentencer would not have awarded the death penalty anyway. *People v. Franklin*, 167 Ill.2d 1, 26, 212 Ill.Dec. 153, 656 N.E.2d 750, 761 (1995). In fact, said the court, while the evidence "could have evoked compassion, ... it could have also demonstrated defendant's potential for future dangerousness." *Id.* at 27, 212 Ill.Dec. 153, 656 N.E.2d at 761. It could have shown that he was "less deterrable or that society needed to be protected from him." *Id.* So it is here; although Landrigan's new evidence can be called mitigating in some slight sense, it would also have shown the court that it could anticipate that he would continue to be violent. He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful. [FN6] There was no prejudice.

FN5. Even aside from what he said at the sentencing hearing, that Landrigan was remorseless can hardly be doubted. After he killed his best friend, Greg Brown, he told a sheriff: "Jim, I tried to kill the m--- f---. I don't take shit off nobody." *Landrigan v. State*, 700 P.2d 2 1 8 , 2 1 9 (Okla.Crim.App.1985). And after killing Dyer, he bragged to an ex- girlfriend that "he had 'killed a guy ... with his hands' about a week before." *Landrigan I*, 176 Ariz. at 4, 859 P.2d at 114.

FN6. In that regard, it should be noted that the new affidavits from family members and former friends do not tend to soften Landrigan's image. They, again, adumbrate a picture of a self-centered, dangerous individual, who would not learn from experience despite well-intentioned efforts.

[10][11] In fine, the district court did not err when it refused to issue the writ on the basis of ineffective assistance of counsel. [FN7]

FN7. We have not overlooked Landrigan's contentions that the district court improperly

limited expansion of the record before it and denied an evidentiary hearing, but we see no merit in those contentions. The district court did allow significant expansion of the record. See Fed. R. Governing § 2254 Cases 7. What it allowed was sufficient, and Landrigan has not shown why additional evidence was relevant and would have affected the outcome. The district court did not abuse its discretion. See *Flamer v. Delaware*, 68 F.3d 710, 735 (3d Cir.1995); *McDougall v. Dixon*, 921 F.2d 518, 532-33 (4th Cir.1990); *Watts v. United States*, 841 F.2d 275, 277 (9th Cir.1988) (per curiam). Similarly, the district court did not abuse its discretion when it determined that an evidentiary hearing was not required. See Fed. R. Governing § 2254 Cases 8; *Shah v. United States*, 878 F.2d 1156, 1160 (9th Cir.1989); *Watts*, 841 F.2d at 277.

B. Other Contentions

****8** Landrigan also mounts a number of other attacks upon his sentencing, none of which can enable him to prevail.

[12][13] Landrigan asserts that the whole Arizona capital sentencing scheme is unconstitutional because a judge, rather than a jury, decides the sentencing issue. *See* Ariz.Rev.Stat. § 13-703. The Supreme Court has ruled otherwise. *See Walton v. Arizona*, 497 U.S. 639, 647-49, 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511 (1990). But, says Landrigan, *Apprendi* [FN8] undercuts *Walton*. Perhaps so, but we must leave it to the Court to overrule its own cases, if and when it decides to do so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989); *1230 *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir.2001), *cert. denied*, --- U.S. -- --, 122 S.Ct. 323, --- L.Ed.2d ----, (2001). We need not, and do not, decide whether *Apprendi* applies at all in this habeas corpus proceeding. *Cf. Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir.2000) (*Apprendi* is a new rule which does not apply on collateral review of cases where elements omitted from state information.).

FN8. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

[14] Landrigan next attacks his sentencing because once the state trial court rejected his alleged intoxication

and past history of drug use as a statutory mitigating factor, it did not go on to consider them as a nonstatutory mitigating factor. It was required to do so. *See Arizona v. Schackart*, 190 Ariz. 238, 252, 947 P.2d 315, 329 (1997); *Arizona v. Jones*, 185 Ariz. 471, 489-91, 917 P.2d 200, 218-20 (1996). Nevertheless, the Arizona Supreme Court could correct that error by reweighing the factors on appeal. It did so here. It said: "[w]e have independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty." *Landrigan I*, 176 Ariz. at 6, 859 P.2d at 116. It then concluded that, "[w]e also agree that the record does not present mitigating evidence sufficiently substantial to call for leniency." *Id.* at 7, 859 P.2d at 117. We have no reason to disbelieve those statements, and they suffice to obviate any error by the trial court. *See Poland v. Stewart*, 117 F.3d 1094, 1101 (9th Cir.1997); *Jeffers v. Lewis*, 38 F.3d 411, 415 (9th Cir.1994). [FN9]

FN9. At any rate, any error in failing to consider Landrigan's use of alcohol and drugs would have been inconsequential; it would have had no effect whatsoever on the outcome.

See Bryson v. Ward, 187 F.3d 1193, 1205-06 (10th Cir.1999) *cert. denied*, 529 U.S. 1058, 120 S.Ct. 1566, 146 L.Ed.2d 469 (2000); *Boyd v. French*, 147 F.3d 319, 327 (4th Cir.1998); *Bolender v. Singletary*, 16 F.3d 1547, 1566-67 (11th Cir.1994); *see also Clemons v. Mississippi*, 494 U.S. 738, 753-54, 110 S.Ct. 1441, 1451, 108 L.Ed.2d 725 (1990); *Hitchcock v. Dugger*, 481 U.S. 393, 399, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987).

[15] Finally, Landrigan attacks his sentencing because in the presentence report the probation officer noted that Dyer's brother "felt the defendant deserved the death penalty," and a police detective believed "the defendant should get a maximum sentence." But, when the Supreme Court has rejected state attempts to require juries to consider family member comments on the proper penalty, that has been because "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth v. Md.*, 482 U.S. 496, 508, 107 S.Ct. 2529, 2536, 96 L.Ed.2d 440 (1987),

overruled on other grounds by Payne v. Tenn., 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991). As the Court said, "Any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.' " *Id.* (citation omitted). There is absolutely no reason to believe that the sentencing judge was influenced or otherwise diverted from her task by the opinion statements in question here. On this record, there is no reason to think that even possible, and the trial judge as much as said that she had not considered the information. Certainly the fairness of the proceeding was not affected. Rather, "we must assume that the trial judge properly applied the law and considered only the evidence [she] knew to be admissible." *Gretzler v. Stewart*, 112 F.3d 992, 1003, 1009 (9th Cir.1997).

CONCLUSION

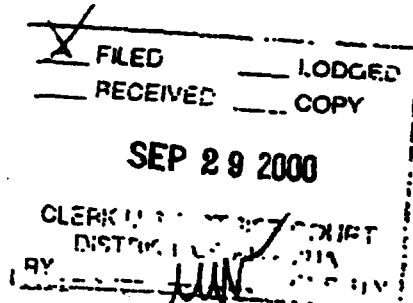
****9** When Landrigan was facing the possibility that the death penalty would be imposed *1231 upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to

demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. He does say that he would have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

AFFIRMED.

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Addendum B



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Henry Moormann,) No. CV-91-1121-PHX-ROS
Petitioner,)
vs.)
Terry Stewart, et al.) ORDER
Respondent.)

In orders filed July 3, 1997, and January 12, 1998, the Court found a number of Petitioner's claims for habeas relief to be procedurally barred. (File docs. 139, 158).¹ Following additional briefing on the merits of Petitioner's remaining claims, the Court entered judgment on April 5, 2000, denying a writ of habeas corpus. (File doc. 184). On June 12, 2000, the Court denied a motion for new trial. (File doc. 187). Petitioner filed a Notice of Appeal on July 7, 2000. Pending before the Court is Petitioner's Application for Certificate of Appealability.

Rule 22(b) of the Federal Rules of Appellate Procedure, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides that if an appeal is taken by a petitioner,

¹ "File doc." refers to documents in this Court's file

190

1 the district judge who rendered the judgment shall either issue a
2 certificate of appealability or state the reasons why such a
3 certificate should not issue. Section 2253 of title 28, United
4 States Code, as amended by the AEDPA,, provides that a certificate
5 may issue "only if the applicant has made a substantial showing of--
6 the denial of a constitutional right." 28 U.S.C. § 2253(c) (1994
7 ed., Supp. III). This showing must be made with respect to each
8 issue a petitioner seeks to raise on appeal and can be established
9 by demonstrating that "reasonable jurists could debate whether (or,
10 for that matter, agree that) the petition should have been resolved
11 in a different manner or that the issues were 'adequate to deserve
12 encouragement to proceed further.'" Slack v. McDaniel, ___ U.S.
13 ___, ___, 120 S. Ct. 1595, 1603 (2000), citing Barefoot v. Estelle,
14 463 U.S. 880, 893 & n.4, 103 S. Ct. 3383, 3394 & n.4 (1983).

15 For claims decided by the district court on the merits, a
16 petitioner need only establish that reasonable jurists would find
17 the court's assessment of the constitutional claim debatable or
18 wrong. Slack, 120 S. Ct. at 1604. When a claim has been denied on
19 procedural grounds without analysis on the merits, the district
20 court engages in a two-part inquiry in deciding whether to grant a
21 certificate of appealability. Specifically, a petitioner must show
22 that jurists of reason would find it debatable both whether the
23 petition states a valid claim of the denial of a constitutional
24 right and whether the district court was correct in its procedural
25 ruling. Id.; see also Lambright v. Stewart, 220 F.3d 1022, 1026-27
26 (9th Cir. 2000) (explaining that where district court's procedural
27 ruling debatable, COA should issue if petitioner facially alleged
28 denial of constitutional right).

1 In the present motion, Petitioner seeks a certificate of
2 appealability with respect to 40 issues, 33 of which allege
3 procedural error by this Court. Applying the standards set forth
4 in Slack, the Court finds that Petitioner has met the standard for
5 a certificate of appealability on the following issues:

- 6 (1) Whether Petitioner fairly presented all aspects of his
7 ineffective-assistance-of-counsel claims in state court;
- 8 (2) Whether the procedural bar applied by the trial court in
9 post-conviction proceedings is a clearly established and
10 regularly applied rule;
- 11 (3) Whether the trial court's failure to appoint conflict-
12 free counsel in Petitioner's post-conviction proceedings
13 constitutes cause to excuse the default of Petitioner's
14 ineffective-assistance-of-counsel claims;
- 15 (4) Whether Petitioner established the miscarriage-of-
16 justice exception for his procedurally defaulted claims;
- 17 (5) Whether the Arizona Supreme Court's independent review
18 of Petitioner's sentence exhausted Petitioner's
19 sentencing error claims;
- 20 (6) Whether the state courts failed to consider mitigating
21 evidence;
- 22 (7) Whether the A.R.S. §§ 13-706(F)(5) and (F)(6)
23 aggravating factors were unconstitutionally applied in
24 determining Petitioner's sentence; and
- 25 (8) Whether appellate counsel rendered ineffective
26 assistance by failing to present proportionality
27 arguments for consideration by the Arizona Supreme
28 Court.

21 The Court denies a certificate of appealability as to the
22 remaining claims raised in Petitioner's motion. Petitioner's
23 claims alleging lack of probable cause for arrest and an overbroad
24 search warrant are barred by Stone v. Powell, 428 U.S. 465 (1976).
25 Claims not specifically argued to the Arizona courts are not
26 exhausted by virtue of fundamental error review. See Poland v.
27 Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997). In determining
28

1 whether state court remedies are available for unexhausted claims,
2 a habeas court necessarily looks to the state rules presently in
3 effect.

4 Petitioner's allegations concerning the Court's fair
5 presentation analysis of Claim 4 (gruesome photos), Claim 6
6 (burden-shifting instructions), Claim 8 (rebuttal evidence/closing
7 argument re: insanity), and Claim 10 (denial or right to testify)
8 are adequately addressed in the Court's order of July 3, 1997, and
9 will not be repeated here. Similarly, the Court finds that its
10 resolution of Petitioner's claims concerning the voluntariness of
11 his statement to police, the lack of lesser-included offense
12 instructions, and the Arizona Supreme Court's proportionality
13 review, as set forth in the Court's order of April 5, 2000, is not
14 debatable among jurists of reason.

15 Based on the foregoing,

16 IT IS HEREBY ORDERED that Petitioner's Motion for Certificate
17 of Appealability is GRANTED IN PART.

18 IT IS FURTHER ORDERED directing the Clerk of Court to forward
19 a copy of this Order together with a copy of the Notice of Appeal
20 to the Ninth Circuit Court of Appeals.

21
22 DATED this 26 day of September, 2000.

23
24
25 
26 Roslyn O. Silver
27 United States District Judge
28

Addendum C

Stewart v. Smith, 534 U.S. ____; 2001 WL 1046998 (Dec. 12, 2001).

The following question was certified to the Arizona Supreme Court:

At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), *see* Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, *see State v. French*, 198 Ariz. App. 119, 121–122, 7 P. 3d 128, 130–131 (2000); *State v. Curtis*, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, *see State v. Espinosa*, 200 Ariz. App. 503, 505 29 P. 3d 278, 280 (2001)?

Addendum D

State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001) *petition for cert. filed*, (U.S. Sept. 18, 2001) (No. 01-488). The question presented is:

Walton v. Arizona, 497 U.S. 539 (1990), held that Arizona's capital sentencing statute, which assigns solely to the trial judge the responsibility for making the findings of fact which are necessary to subject a defendant to a death sentence, does not contravene the Sixth Amendment's jury-trial right as made applicable to the States through the Fourteenth Amendment's Due Process Clause.

The question presented is whether *Walton* should be overruled in light of this Court's subsequent holding, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" (*id.* at 490 (internal quotation marks omitted)) violates the defendant's Sixth Amendment rights to a jury trial.

No. 00-99011

FILED

JUL 02 2004

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN,

Petitioner-Appellant,

v.

DORA B. SCHRIRO, *et al.*,

Respondents-Appellees.

SUPPLEMENT TO PETITIONER-APPELLANT'S PETITION
FOR PANEL REHEARING AND REHEARING *EN BANC*

On Appeal from the United States District Court
for the District of Arizona

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No. 00-99011

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN,

Petitioner-Appellant,

v.

DORA B. SCHRIRO, *et al.*,

Respondents-Appellees.

SUPPLEMENT TO PETITIONER-APPELLANT'S PETITION
FOR PANEL REHEARING AND REHEARING *EN BANC*

Statement of the case

Petitioner-Appellant Jeffrey Timothy Landrigan, f.k.a. Billy Patrick Wayne Hill ("Landrigan"), supplements his prior Petition for Panel Rehearing and Rehearing *En Banc* submitted to this Court on January 3, 2002. This pleading supplements the arguments made in sections A, B, and C of the petition.

Since this Court issued its decision, *see Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001), the Supreme Court decided *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct.

2527 (2003). In addition, other panels of this Court have decided several habeas corpus cases involving ineffective assistance of counsel in circumstances similar to those of Landrigan. In each case, trial counsel was deemed ineffective and relief was granted. It is for this reason that Landrigan supplements his Petition for Rehearing and Rehearing *En Banc*.

Landrigan has previously filed supplemental authority concerning his claim of ineffective assistance of counsel. See Citation of Supplemental Authority filed Feb. 6, 2002; Supplement filed June 25, 2002; Supplement filed July 3, 2003. In order to update previously filed authority and provide the Court with recent authority, Landrigan has prepared a comprehensive pleading to include the relevant cases on ineffective assistance of counsel decided after the panel decision.

A. *Wiggins v. Smith*

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), counsel at sentencing “introduced no evidence of Wiggins’ life history” after conducting a very limited investigation of the defendant’s background. 123 S.Ct. at 2532. The Court stated that the exercise of reasonable professional judgment includes a “context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). From the presentence investigation report and social service records,

counsel knew that Wiggins' mother was an alcoholic, he was raised in foster care, he had been physically and sexually abused, and may have been mentally retarded. *Id.* at 2533. Although the state had made funds available to Wiggins' trial counsel to hire experts to investigate Wiggins' family history, trial counsel did not use that money. *Id.*

Counsel claimed that they chose to focus their efforts on disputing Wiggins' responsibility for the murder instead of continuing to investigate his family background for presentation as mitigating evidence. *Id.* at 2535. The Court, however, found that Wiggins' dysfunctional family history, as revealed by the reports of the social services agency that placed him in foster care, should reasonably have suggested to his trial counsel that "pursuing these leads was necessary to making an informed choice among possible defenses" *Id.* at 2537. Furthermore, "[the] record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id.* For this reason, the Court concluded that counsel had "[fallen] short of the standards for capital defense work articulated by the American Bar Association—standards to which we have long referred as 'guides to determining what is reasonable.'"¹ *Id.* at 2536-37 (quoting

¹Since *Wiggins*, courts in other circuits and districts have referred to the ABA guidelines as standards by which counsel's performance must be measured. *See, e.g.,*

Strickland, 466 U.S. at 689).

The Court also found that trial counsel's unreasonable investigation prejudiced Wiggins' defense. "Petitioner . . . has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Id.* at 2542 (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). The "nature and extent of the abuse [Wiggins] suffered" led the Court to find a "reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form." *Id.* Accordingly, the Court reversed the Fourth Circuit's denial of Wiggins' habeas petition.

Like Wiggins' counsel, Landrigan's attorney knew that his client was raised by an alcoholic mother in a very dysfunctional home. (Excerpt of Record ("ER") 236, 245, 250, 261, 264, 266, 272, 277). Counsel knew Landrigan was adopted into that

Cone v. Bell, 359 F.3d 785, 804 (6th Cir. 2004) (Merritt, J., concurring) (using ABA guidelines as the "articulation of long-established 'fundamental' duties of trial counsel"); *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003) (finding counsel ineffective for failure to perform mitigation investigation at sentencing and stating, "the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rule and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases."); *see also* *Rompilla v. Horn*, 359 F.3d 310 (3rd Cir. 2004) (Nygaard, J., dissenting from denial of Petition for Rehearing *en banc*); *Rompilla v. Horn*, 359 F.3d 310 (3rd Cir. 2004) (Sloviter, J., dissenting); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (Henry, J., concurring); *Marshall v. Hendricks*, 313 F.Supp.2d 423, 457 (D. N.J. 2004) (finding that defense counsel's performance at sentencing fell below the 1986 ABA standards and granting habeas corpus relief).

family after his biological mother exposed him to drugs and alcohol while *in utero*, and that Landrigan had a long history of drug abuse. (ER 158-159, 238, 246, 250, 262, 267, 269, 270, 273, 275). These facts indicate a troubled history of the type the *Wiggins* Court declared relevant to culpability. As in *Wiggins*, the inadequate investigation of these facts should be considered highly prejudicial to Landrigan's defense.

Like *Wiggins*' counsel, Landrigan's attorney failed to conduct a thorough investigation of the defendant's family background and its effect on his mental state despite counsel's awareness of troubling indicators. Counsel spoke with Landrigan's adoptive mother for only two hours and did not contact his adoptive sister, who would have provided information regarding Landrigan's childhood and the significant problems caused by their mother's alcoholism. (ER 214). Landrigan's protests regarding the introduction of mitigating evidence in his case do not excuse his attorney's failure to investigate or introduce the evidence. Moreover, Landrigan's protests do not allow his attorney's inaction to be characterized as "strategic judgment." Counsel's investigation was deficient in light of counsel's awareness of Landrigan's circumstances and should lead to a finding of ineffectiveness under *Wiggins*.

B. *Allen v. Woodford*

Allen v. Woodford, 366 F.3d 823, 844 (9th Cir. 2004) (Graber, Wardlaw & Clifton, CJJ.), further explains the standards of counsel during the penalty phase of a capital case. Allen's trial counsel did not begin an investigation into mitigation evidence until the jury had handed down their guilty verdict. The Court took notice that "preparation for the sentencing phase of a capital case should begin early and even inform preparation for a trial's guilt phase: 'Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial The timing of this investigation is critical. If the life investigation awaits the guilt verdict, it will be too late.'" *Id.* at 845 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L.REV. 299, 320, 324 (1983)). Because Allen's counsel did not allow himself sufficient time to investigate Allen's life for mitigation evidence, and the investigation that was completed in the week between the guilty verdict and the beginning of the penalty phase was minimal, the Court found his conduct constitutionally deficient. *Id.* at 846.²

²Despite the Court's finding that Allen's counsel was constitutionally deficient, the denial of Allen's habeas petition was affirmed. The Court determined that the possible mitigation evidence that counsel failed to present would not have outweighed the substantial evidence in aggravation, and thus there was no actual prejudice to Allen. *Id.*

There is no question that Landrigan's counsel was deficient for failing to meaningfully investigate possible mitigation evidence. (ER 46, 213, 298). Moreover, there was no excuse for counsel's failure to investigate mitigation evidence. George LaBash was the investigator assigned to the Landrigan case. In all, he spent only about thirteen hours on the case. One hour was spent waiting at the county motor pool for an automobile. (ER 292-293, 294.) Mr. LaBash was frustrated by the lack of coordination and his limited role. (ER 294.) According to Mr. LaBash, the county public defender's office was "budget oriented." (ER 294, 295.) Mr. LaBash was unaware of the necessity of conducting an investigation for the sentencing phase of a capital case. He had never conducted a sentencing investigation. (*Id.*)

In all, counsel spoke to only two individuals: Landrigan's birth mother, Virginia, and Landrigan's ex-wife, Sandy. Mr. Farrell spoke to Virginia a few times over a seven month period. Mr. Farrell spoke to Sandy only once during a drive from the airport. Finally, Mr. Farrell had minimal contact with Dr. Mickey McMahon, Ph.D., the psychologist hired to offer his "impressions" of Landrigan.

Three months after Landrigan had been found guilty, Mr. Farrell was still collecting the records that he should have gathered long before the start of the trial. (ER 36, 40, 43.) Without this foundational documentation, it was impossible for counsel to have developed a social history, make informed decisions about defenses

and mitigation and effectively counsel his client about sentencing options. It is likely that, given his turbulent and abusive childhood, history of mental illness, life-long drug addiction, and organic brain dysfunction the trial judge would have come to view Landrigan differently.

C. Stankewitz v. Woodford

A panel of this Court applied *Wiggins* in *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004) (O'Scannlain, Fisher and Bybee, CJJ.), stating that counsel's duty to conduct a thorough investigation at the penalty phase "is not discharged merely by presenting some limited evidence." 365 F.3d at 716. Stankewitz's attorney called six witnesses who provided some general information but few details about the defendant's background, which included physical and sexual abuse, 22 foster homes, drug abuse, and brain dysfunction partially attributable to Fetal Alcohol Syndrome. *Id.* at 716-18. The discrepancy between the evidence the attorney actually presented and the evidence he could have presented on Stankewitz's behalf led the Court to find ineffective assistance of counsel and to remand the case for an evidentiary hearing. *Id.* at 716, 725.

The Court found "tantalizing indications" in the record that should have led counsel to investigate further. *Id.* at 720. Counsel had not even been aware of Stankewitz's brain dysfunction because he failed to procure a psychological

evaluation. *Id.* at 719. The attorney stated that his investigation was limited because Stankewitz opposed the presentation of mitigating evidence and objected to his family members being called as witnesses. *Id.* at 721. The Court rejected this excuse, finding no evidence that Stankewitz objected to interviews with his family and holding that counsel “had a duty to investigate what evidence potentially could have been presented and discuss this evidence with Stankewitz in order to obtain an informed and knowing waiver.” *Id.* at 722. The Court decided that although counsel did not completely fail to present mitigating evidence, Stankewitz was prejudiced because the evidence presented was cursory. *Id.* at 725.

Landrigan’s attorney failed to make an adequate presentation of mitigating circumstances. No mitigation testimony or evidence was presented at Landrigan’s sentencing hearing. While Stankewitz’s attorney called witnesses, Landrigan’s attorney offered the court only a proffer mentioning a few problems in Landrigan’s background. *State v. Landrigan*, 859 P.2d 111, 118 (Ariz. 1993). Here, the panel acknowledged the paucity of mitigation put forth by Landrigan’s counsel, “[c]ertainly, Landrigan is entitled to have mitigating evidence presented on his behalf; certainly, little was presented here.” *Landrigan v. Stewart*, 272 F.3d at 1224.³

³The district court acknowledged “[t]he proffer did not include any other evidence which may have been discovered through additional investigation.” (ER 380.)

Landrigan's counsel failed not only to adequately present mitigating evidence to the court, but also to perform the necessary steps to uncover additional evidence that could have affected Landrigan's sentence. Landrigan, like Stankewitz, suffers from organic brain dysfunction likely caused by Fetal Alcohol Syndrome. (ER 158-59, 152-53, 162). Landrigan's counsel was unaware that Landrigan was exposed to alcohol and other toxic substances while *in utero*. The attorney did not provide his expert with the adequate background information, and subsequently, Landrigan's brain disorder was not diagnosed until after he was sentenced to death. (ER 298, 178, 300, 152-53, 162).

Landrigan, like Stankewitz, objected to the presentation of mitigating evidence at his sentencing hearing and asked that certain members of his family not be used as witnesses. *Landrigan v. Stewart*, 272 F.3d at 1225. Also like Stankewitz, however, Landrigan did nothing to prevent his attorney from interviewing anyone or otherwise conducting an investigation. According to the *Stankewitz* Court, the defendant's "purported objection to mitigating evidence appears not to have been 'informed and knowing' because there is no evidence that [counsel] conducted an adequate investigation." *Stankewitz*, 365 F.3d at 722. Similarly, Landrigan's objections to mitigating evidence do not absolve his attorney's responsibility to investigate potential evidence. Although he could have done so, counsel did not obtain a

thorough psychological evaluation, investigate the effect of Landrigan's drug use on his behavior, or interview more than two family members. (ER 46, 213, 298).

D. *Garceau v. Woodford*

In *Garceau v. Woodford*, 275 F.3d 769, 779 (9th Cir. 2001) (O'Scannlain, Tashima & Thomas, CJJ.),⁴ counsel failed to investigate mitigating evidence relating to Garceau's drug addiction and post-traumatic stress disorder. Counsel knew of his client's extensive cocaine use, yet failed to investigate the extent of the use and question witnesses about changes in Garceau's behavior. *Id.* In addition, "[c]ounsel put on no expert testimony at all during the penalty phase," and failed to investigate or refute aggravating evidence. *Id.* at 780. Although the majority of the Court granted the habeas petition on other grounds, Judge Thomas went on to address the claim of ineffective assistance of counsel at sentencing. *Id.* at 777. In a concurring opinion, Judge Thomas stated that "if we were not reversing on the grounds stated in the majority opinion, we would necessarily have to reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase." *Id.* at 778. Judge O'Scannlain agreed with Judge Thomas on this point. *Id.* at 781. (O'Scannlain, J.,

⁴Judge O'Scannlain dissented, stating that even if the "other crimes" jury instruction violated Garceau's due process rights, such error was harmless under the deferential standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Garceau*, 275 F.3d at 781-84.

concurring in part and dissenting in part).

Landrigan also had a severe drug addiction, beginning when he was in the seventh grade. (ER 238, 246, 250, 262, 267, 269, 270, 273, 275.) Like Garceau's counsel, Landrigan's attorney failed to investigate the extent, cause, or effect of the drug use, and failed to interview witnesses about Landrigan's behavioral changes resulting from the drug abuse. Landrigan's case also parallels *Garceau* because Landrigan's counsel failed to present expert testimony that could have explained the relation between Landrigan's behavior and his drug addiction.

E. Silva v. Woodford

In *Silva v. Woodford*, 279 F.3d 825, 839 (9th Cir. 2002) (B. Fletcher, Thomas & Wardlaw, CJJ.), petitioner advised his lawyer that his "parents were not to be called as witnesses[.]" Yet the Court found that "[c]ounsel's duty to *investigate* mitigating evidence is neither entirely removed nor substantially alleviated by his client's direction not to call particular witnesses to the stand." *Id.* at 838. Thus, the client's remark did not excuse counsel from conducting an investigation. "[E]ven if [counsel] could not call Silva's parents as witnesses, [counsel] still had a duty to determine what evidence was out there in mitigation in order to make an informed decision as to how to best represent his client." *Id.* at 847. After finding counsel's performance deficient, and relying on circuit precedent, the Court found evidence

offered by Silva—“organic brain disorders resulting from Fetal Alcohol Syndrome,” “repeated failures in school,” and “eventual self-medication through the use of drugs”—to be compelling. The Court concluded that counsel’s failure to investigate was prejudicial and undermined confidence in the results of the penalty phase. *Id.* at 847 nn.17 & 22.

Landrigan, like Silva, told his lawyer he did not want his biological mother or ex-wife to testify. (ER 377.) Although more expressive than Silva in making his point (ER 45-53), Landrigan never advised counsel that he should not conduct an investigation, nor did he refuse to permit other evidence of mitigation at the sentencing hearing.⁵ Furthermore, the same omitted mitigating evidence the Court found compelling in *Silva*, such as organic brain disorder, Fetal Alcohol Syndrome, and drug abuse, is also present in the instant case. (ER 152, 153, 162, 158-59, 238, 246, 266, 272, 277.)

F. *Turner v. Calderon*

In *Turner v. Calderon*, 281 F.3d 851, 891 (9th Cir. 2002) (Wardlaw, Paez & Tallman, CJJ.), the Court’s analysis of Turner’s claim of ineffective assistance of counsel at sentencing began by stating “[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase,” even if

⁵See Petition for Panel Rehearing and Rehearing *En Banc* at 8 n.3.

trial counsel decides against introducing it in furtherance of a strategy. The Court, applying pre-AEDPA standards, agreed with Turner and found that his trial counsel failed to unearth Turner's "drug use and the effects it had on him," as well as his "abusive and difficult childhood." *Id.* at 894. Although there were a number of individuals, from school teachers to employers, that could have been called to testify on Turner's behalf, counsel failed to bring any of them to the stand. *Id.* The Court concluded, "[b]ecause [counsel] failed to uncover potentially persuasive mitigating evidence, we conclude that [counsel's] penalty phase assistance may have been constitutionally ineffective." *Id.* at 894-95. As a result, the matter was remanded for an evidentiary hearing.⁶

The facts relevant to the penalty phase of Turner's trial are analogous to Landrigan's. Although there were a number of individuals, such as Landrigan's teachers, birth father, and adoptive parents, that counsel could have interviewed and called as witnesses, no such effort was made. (ER 226, 263, 283.) As in *Turner*, Landrigan's counsel failed to conduct an investigation into the effects of Landrigan's long-term drug abuse. Similarly, there was no investigation into circumstances surrounding Landrigan's adoption and his difficult childhood. (ER 152, 153, 162.)

⁶Landrigan requested but was not afforded an evidentiary hearing in state post-conviction proceedings or habeas corpus proceedings in the district court.

G. Caro v. Woodford

In *Caro v. Woodford*, 280 F.3d 1247, 1299 (9th Cir. 2002) (Ferguson, Pregerson & Kleinfeld, CJJ.),⁷ trial counsel “failed to seek out an expert to assess the damage by the poisoning of Caro’s brain,” and failed to present testimony explaining the effects of the “severe physical, emotional, and psychological abuse to which Caro was subjected as a child.” The Court stated, “[b]ecause it has been established that Caro suffers from brain damage, the delicate balance between his moral culpability and the value of his life would certainly teeter toward life.” *Id.* at 1258. The Court affirmed the district court’s decision to grant Caro’s habeas petition, vacated his death sentence, and ordered a re-sentencing hearing.⁸

Landrigan’s trial counsel failed to conduct an investigation for sentencing. Only after Landrigan was sentenced to death, was an appropriate investigation of his mental and personal background finally conducted. Through this untimely investigation, it was discovered that Landrigan, like Caro, suffers from organic brain dysfunction. (ER 152, 153, 162.) Landrigan also suffers from Fetal Alcohol

⁷Judge Kleinfeld filed a dissenting opinion stating that the majority erred in deciding whether Caro was brain damaged because the only question before the Court was whether Caro’s lawyer rendered ineffective assistance of counsel at the time of sentencing. *Caro*, 280 F.3d at 1259-60.

⁸The district court’s decision came after this Court previously remanded the case for an evidentiary hearing on a claim of ineffective assistance of counsel at the penalty phase of trial. *Caro v. Calderon*, 165 F.3d 1223, 1228 (9th Cir. 1999).

Syndrome (ER 158-159), had an alcoholic mother (ER 236, 245, 250, 261, 264, 266, 272, 277), and abused drugs. (ER 238, 246, 250, 262, 267, 269, 270, 273, 275.) Because two cases with such similar mitigating evidence have resulted in the relief sought by Landrigan, this Court should grant Landrigan's request for relief (or rehearing).

H. *Karis v. Calderon*

In *Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002) (Hug, Browning & Kleinfeld, CJJ.),⁹ trial counsel only spoke with three of Karis' family members: his mother, his brother (who had suffered brain damage), and his aunt. At the sentencing hearing, Karis' counsel presented only forty-eight minutes of mitigation. *Id.* at 1135. During that time, counsel called witnesses who testified that Karis had artistic and academic talent, that his mother had been divorced, and that he saved his brother from drowning when he was a child. *Id.* However, counsel failed to discover and present evidence of Karis' abusive family. *Id.* at 1136. The Court found that,

“[c]ounsel's failure to represent such substantial and mitigating evidence was woefully inadequate and kept crucial information from the jury faced with sentencing Karis to life or death. A 'reasonable probability' exists that a jury would find this information important in understanding the root of Karis' criminal behavior and his

⁹Judge Kleinfeld concurred as to ineffective assistance of counsel at the guilt phase of trial, but dissented as to the penalty phase, stating that counsel thoroughly investigated and prepared for sentencing. *Karis*, 283 F.3d at 1141-46.

culpability.”

Id. at 1135, 1140. This Court affirmed the judgment of the district court granting Karis’ habeas petition.

Like *Karis*, Landrigan’s counsel interviewed very few people in preparation for the mitigation hearing. Karis’ counsel spoke with three of his family members, whereas Landrigan’s attorney only spoke with two. (ER 46, 213.) Similarly, Karis’ counsel called witnesses to testify during the mitigation hearing, whereas Landrigan’s attorney called none. It is true that Landrigan objected to his counsel calling his family members as witnesses (ER 377), but Landrigan did nothing to prevent his lawyer from conducting an adequate investigation into other mitigating evidence or from calling other witnesses.¹⁰

As the Court stated in *Karis*, the fact that the defendant’s family does not want to provide information does “not excuse counsel from investigating such substantial mitigating evidence.” However, the panel failed to apply this rationale in Landrigan’s case.

I. Jennings v. Woodford

In *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (Fletcher, Nelson & Berzon, CJJ.), the Court did not base its decision on the claim of ineffective

¹⁰See Petition for Panel Rehearing and Rehearing *En Banc* at 8.

assistance of counsel at the *penalty* phase of trial. Instead, the habeas petition was granted due to ineffective assistance of counsel at the *guilt* phase of trial. However, because the analysis for ineffective assistance of counsel is the same at either phase of trial, the Court would have come to the same conclusion regarding the claim of ineffective assistance of counsel at the penalty phase, had it not been rendered moot by the granting of the previous claim.

In *Jennings*, counsel failed to “request copies of voluminous medical records[,] . . . inquire into possible child abuse[,] . . . seek the appointment of additional experts to evaluate Mr. Jennings’ mental state or the possible effects of methamphetamine[,] . . . discuss the effects of Mr. Jennings’ drug use with his client or others who observed him under the influence[,] . . . review stacks of medical records,” or “conduct any investigation into possible mental defenses because he had settled early on an alibi defense.” 290 F.3d at 1013-14. Had counsel undertaken a necessary and diligent investigation, such information would have been found. Counsel’s failure produces “the probability of a different result ‘sufficient to undermine confidence in the outcome.’” Therefore, [counsel’s] ineffective performance was prejudicial.” *Id.* at 1016, 1019 (quoting *Strickland*, 466 U.S. at 694). This Court remanded the case back to the district court with instructions to grant the petition for writ of habeas corpus.

Like *Jennings*, counsel for Landrigan failed to investigate Landrigan's mental health and drug abuse. Counsel did not adequately review Landrigan's medical records, seek expert witnesses to conduct anything more than an "impression" interview, interview those who observed Landrigan under the influence of drugs, or seek an expert to evaluate the effects of methamphetamine. Had such information been discovered and presented during the penalty phase of Landrigan's trial, it is probable that he would not have been sentenced to death.

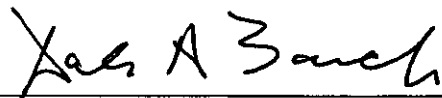
Conclusion

The panel's decision in *Landrigan* contradicts the Supreme Court in *Wiggins* and this Court's own holdings in the cases cited *supra*. To prevent a miscarriage of justice and maintain consistency in the application of a defendant's constitutional right to effective assistance of counsel, the panel or the Court should grant Landrigan's petition for rehearing or rehearing *en banc*.

Respectfully submitted this 24th day of June, 2004.

Frederic F. Kay
Federal Public Defender
Dale A. Baich
Sylvia J. Lett

By

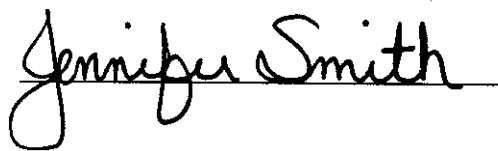


Counsel for Petitioner-Appellant

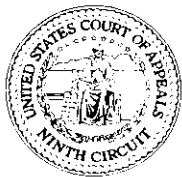
Certificate of service

The undersigned hereby certifies that on the 24th day of June, 2004, this supplement to the petition for rehearing and rehearing *en banc* was sent by Federal Express to the Court and one copy was mailed to:

James P. Beene
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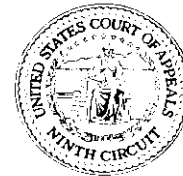
A handwritten signature in black ink that reads "Jennifer Smith". The signature is written in a cursive style and is positioned above a horizontal line.

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(415) 556-9800

To: Panel and all active judges and any interested senior judges

**Re: Response to petition for panel rehearing and/or
petition for rehearing en banc**

00-99011 *Landrigan v. Schriro*

Opinion dated November 28, 2001

Panel Judges: Honorable Ferdinand F. FERNANDEZ, Senior Circuit Judge

 Honorable Pamela Ann RYMER, Circuit Judge

 Honorable Kim McLane WARDLAW, Circuit Judge

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STATEMENT OF THE CASE

The extensive history of this case is set forth in detail at pages 1 through 10 of Respondents'-Appellee's Answering Brief. On November 28, 2001, a 3-judge panel of this Court issued an opinion, affirming the district court's denial of Petitioner's petition for writ of habeas corpus. *See Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001). On January 3, 2002, Petitioner filed a petition for panel rehearing and rehearing *en banc*, raising four claims. By order filed November 22, 2004, this Court ordered Respondents to file a response to the petition for rehearing and rehearing *en banc*.

GROUND FOR DENYING PETITION FOR REHEARING AND REHEARING EN BANC

I

THE PANEL CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ERR WHEN IT REFUSED HABEAS RELIEF ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends that the panel "excused" his counsel's failure to properly investigate potentially mitigating information that he could have presented at the sentencing hearing. (Petition at 5.) Petitioner argues that the panel's decision on this issue contravenes the decisions in *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); and *Wiggins v. Smith*, 539 U.S. 510 (2003). Petitioner is incorrect.

Petitioner's reliance on *Strickland*, *Williams*, and *Wiggins* is misplaced. In these three cases, the United States Supreme Court discussed the duty of a lawyer to *investigate* possible mitigation evidence. *Strickland*, 466 U.S. at 691; *Williams*, 529 U.S. at 396; and *Wiggins*, 539 U.S. at 519–20. But neither *Strickland*, *Williams*, nor *Wiggins* discuss whether a lawyer has a duty to investigate and present mitigation evidence when his client *obstructs* the investigation and opposes presentation of mitigation evidence at sentencing.¹

This Court's decision in *Hayes v. Woodford*, 301 F.3d 1054 (9th Cir. 2002), is more instructive and provides specific guidance on how an ineffective assistance of counsel claim should be analyzed when the defendant informs his attorney that he does not want mitigation evidence investigated or presented at a sentencing hearing. *Hayes* involved strikingly similar facts.

In *Hayes*, defense counsel presented testimony at the penalty phase from two counselors who had worked with Hayes during his juvenile confinement. *Hayes*, 301 F.3d at 1065. These two witnesses testified that Hayes flourished in

¹ In Petitioner's supplement to his Petition for Rehearing and Rehearing *en banc*, Petitioner cites several cases decided by this Court, since *Landrigan*, that discuss a lawyer's duty to investigate for possible mitigation evidence. For the same reason that Petitioner's reliance on *Strickland*, *Williams*, and *Wiggins* is misplaced, so is Petitioner's reliance on these cases. See *Allen v. Woodford*, 366 F.3d 823 (9th 2004); *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001); *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002); *Caro v. Woodford*, 280 F.3d 1247 (9th (continued ...)

structured environments away from drugs and alcohol. *Id.* The testimony presented at Hayes’s sentencing hearing described him as a “model ward” and a “leader” within the institution. *Id.* Hayes offered no other witnesses at the sentencing hearing. *Id.*

Hayes argued that his lawyer’s representation was constitutionally deficient because he failed to investigate and to present potentially mitigating evidence regarding Hayes’s family background, drug abuse, and mental health. *Hayes*, 301 F.3d at 1065. This Court analyzed this claim under the two-pronged test for effectiveness established in *Strickland*. *Id.*

In *Hayes*, this Court recognized “the importance of presenting the available mitigating evidence in order for the jury to fairly make the vital determination of whether the defendant will live or die.” *Hayes*, 301 F.3d at 1066, *citing Karis*, 283 F.3d at 1135. This Court stated that the brevity of Hayes’s penalty phase presentation did not by itself render counsel’s performance constitutionally inadequate. *Id.* See *Bell v. Cone*, 535 U.S. 686 (2002). Rather, this Court found the attorney’s decision to focus narrowly on Hayes’s ability to flourish in a structured environment and benefit to the prison population as a reasonable tactical decision. *Id.* at 1066–67. This tactical

(... continued)

Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002); and *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002).

decision was particularly reasonable in light of Hayes's express request not to involve his family in the case. *Id.* at 1067.

In examining whether counsel was deficient in failing to offer evidence on family background, this Court held that a defendant's request to refrain from involving his family does not necessarily excuse counsel's failure to investigate potentially mitigating evidence. *Hayes*, 301 F.3d at 1067. However, this Court went on to state that the client's wishes *do* inform the court's view of the reasonableness of a particular course of action taken by counsel. *Id.* See *Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Hayes told his lawyer "that he did not want his family involved in the case." *Hayes*, 301 F.3d at 1067.

Both the sentencing court and Hayes' attorney told Hayes that testimony from his family could help him avoid a death sentence. *Hayes*, 301 F.3d at 1068. Hayes disregarded this advice and directed his attorney not to investigate or present evidence of his family background at sentencing. *Id.* This Court found that Hayes's lawyer's decision—at his client's adamant request—not to investigate or present evidence of Hayes's family background was reasonable and not constitutionally deficient. *Id.*

Like the attorney in *Hayes*, Petitioner's counsel conducted an investigation into his client's background. [Petitioner's Excerpts of Record (ER) 36, 39–40, 43.] Petitioner's attorney retained a psychologist and contacted Petitioner's mother and ex-wife for the sentencing hearing. Petitioner's attorney was in the process of investigating Petitioner's background when Petitioner informed him that he did not want *any* investigation into his background or *any* mitigation evidence presented at the sentencing hearing. Indeed, the panel in *Landrigan* noted that it appeared “the investigation was not necessarily over just because the sentencing hearing had commenced.” *Landrigan*, 272 F.3d at 1227.

At the October 25, 1990, sentencing hearing, Petitioner's counsel planned to have his client's ex-wife and biological mother testify at the hearing. [ER 53–54.] Specifically, Petitioner's attorney wanted Petitioner's mother to testify regarding her drug usage before, during, and after her pregnancy with Petitioner. [*Id.* at 54–55.] Petitioner's counsel wanted to provide this information to a medical expert who would testify concerning the psychological and physiological effects that a person would suffer from if born under these conditions. [*Id.* at 55.] Petitioner prevented his attorney from presenting this evidence when he asked his biological mother not to testify at the sentencing hearing and then told his attorney and the sentencing court that he did not want *any* mitigation evidence presented on his behalf. [*Id.* at 45.] Petitioner's

decision to abandon the investigation and presentation of mitigating evidence at sentencing was made after his attorney and the sentencing court informed him of the possible consequences of that decision. *Landrigan*, 272 F.3d at 1225.

This Court has previously held that, “a lawyer who abandons investigation into mitigating evidence in a capital case at the direction of his client must at least have adequately informed his client of the potential consequences of that decision and must be assured that his client has made informed and knowing judgment.” *Hayes*, 301 F.3d at 1068, *citing Silva v. Woodford*, 279 F.3d 825, 838 (2002). In this case, Petitioner’s counsel advised his client not to proceed to sentencing without a full presentation of the mitigating evidence. The sentencing court also inquired if Petitioner understood the consequences of not presenting mitigation evidence. *Landrigan*, 272 F.3d at 1225. The panel did not err in finding that Petitioner was fully apprised of the importance of presenting mitigating evidence. *Id.*

Contrary to Petitioner’s contention that the panel “excused” his counsel’s failure to properly investigate and present mitigation evidence at the sentencing hearing, the panel properly analyzed the ineffectiveness claim in light of the constitutional issues raised when the client demands that no mitigation evidence be presented. The panel’s decision does not excuse a defense attorney’s failure to afford effective representation; rather, it implies—correctly—that the

representation was as effective as it could have been under the constraints that Petitioner imposed. The panel's decision on this issue did not violate Petitioner's constitutional right to the assistance of effective counsel.

In Petitioner's supplement to his Petition for Rehearing and Rehearing *en banc*, he cites several of this Court's decisions on the issue of ineffective assistance of counsel that have been issued since the panel's decision in *Landrigan*. (Supplemental Petition at 6–19.) Petitioner cites only two cases that involve circumstances where the defendant interfered with his attorney's ability to investigate and/or present mitigation evidence; *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) and *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004). Both *Silva* and *Stankewitz* are distinguishable.

In *Silva*, this Court distinguished counsel's duty to investigate mitigating evidence from the client's request that his family not be called to testify, holding that the mere direction not to *call* certain witnesses to testify does not alleviate counsel's obligation to *investigate*. 279 F.3d at 838–39. (Emphasis added.) *Silva* differs from this case, however, because, Petitioner made it abundantly clear that he did not want *any* mitigation evidence brought to the sentencing court's attention. Unlike *Silva*, the admonition from the Petitioner was not "I do not want my family to be called to testify," it was "I do not want mitigation evidence presented on my behalf."

This Court's opinion in *Stankewitz* is likewise distinguishable. In *Stankewitz*, the trial attorney admitted that he did very little investigation into uncovering mitigation evidence for sentencing. *Stankewitz*, 365 F.3d at 721. But, the attorney explained that he limited his investigation because his client "made it clear" that he was opposed to any penalty phase defense at all and in particular any defense that involved the use of his family as witnesses. *Id.*

This Court found that the attorney's actions in *Stankewitz* were not reasonable for two reasons. *Stankewitz*, 365 F.3d at 721. First, the record did not support Stankewitz's supposed opposition to any penalty phase defense. *Id.* To the contrary, Stankewitz's attorney did present mitigating evidence at the penalty phase and Stankewitz did not object.² In this case, the record is clear, and the panel properly concluded, that Petitioner did not want the sentencing court to hear *any* mitigation evidence. *Landrigan*, 272 F.3d at 1225.

Second, the attorney in *Stankewitz* alleged that his client did not want his family members to be witnesses. *Stankewitz*, 365 F.3d at 721. But, this Court held the attorney's actions unreasonable because Stankewitz never objected to his family being interviewed or to an investigation that relied on non-family

² Apparently, Stankewitz had a propensity to object verbally, in open court, when he disagreed with the decisions of his counsel. *Stankewitz*, 365 F.3d at 721.

members. *Id.* This situation is also easily distinguishable from what occurred in this case. Prior to the sentencing hearing, Petitioner asked his ex-wife and his biological mother not to cooperate with his attorney's investigation and not to testify at the sentencing hearing. *Landrigan*, 272 F.3d at 1225. Petitioner then went to inform his attorney and the sentencing court that he did not want any mitigation evidence presented on his behalf. *Id.* Unlike Stankewitz, Petitioner adamantly opposed any efforts by his attorney or family to uncover and present possible mitigation evidence.

The panel decided *Landrigan* in accordance with the guidelines set forth in *Strickland* and its progeny. Petitioner's argument and citations to cases decided by this Court subsequent to its decision in *Landrigan* are inapplicable.

II

THE PANEL DID NOT IMPROPERLY LIMIT ITS REVIEW OF THE EVIDENCE PETITIONER OFFERED TO PROVE PREJUDICE

Petitioner contends that the panel improperly restricted its consideration of the evidence he presented for mitigation. (Petition at 8.) Respondents disagree.

In determining whether Petitioner was prejudiced by his counsel's actions at sentencing, the panel focused on the evidence of genetic predisposition that Petitioner now states he would have allowed his lawyer to present at sentencing.

Landrigan, 272 F.3d at 1228. The panel based its decision to solely restrict its prejudice analysis to this evidence was based on the holding in *Strickland*, stating “We must consider whether it is reasonably probably that use of *that theory* would have produced a different result.” *Id.* (emphasis added.) See *Strickland*, 466 U.S. at 694. The panel’s review of prejudice based solely on the mitigation factors specified by Petitioner was proper and has been expressly sanctioned by this Court in cases decided after *Landrigan*.³

In *Hayes*, this Court held that where a defendant insists that mitigating evidence not be presented and his attorney adheres to that insistence, this Court analyzes prejudice in terms of whether the additional evidence counsel would have discovered through a proper investigation would have changed the defendant’s mind. *Hayes*, 301 F.3d at 1070, citing *Landrigan*, 272 F.3d at 1228. This standard for assessing prejudice, first enunciated in *Landrigan*, has been subsequently recognized by this Court in *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003) and most recently in *Stankewitz*, 365 F.3d at 722 n. 10.

In his Petition for Rehearing and Rehearing *en banc*, Petitioner states that he has been “unable to discover any other case where an appellate court limited its review to mitigating factors specified by a petitioner.” (Petition at 3 n. 3.)

³ The panel correctly stated that Petitioner would have only cooperated with the pre-sentencing investigation into his genetic predisposition for violence.
(continued ...)

But in *Hayes*, *Douglas*, and *Stankewitz*, all of which were decided after *Landrigan*, this Court limited its review of mitigating factors to the ones specified by a petitioner where the petitioner has obstructed his attorney's efforts to investigate and present mitigation evidence.

III

THE PANEL DID NOT IMPROPERLY CONVERT PETITIONER'S MITIGATION EVIDENCE INTO EVIDENCE OF AN AGGRAVATING FACTOR OF "FUTURE DANGEROUSNESS"

Petitioner argues that the panel erroneously converted evidence of mitigation into a non-statutory aggravating factor of "future dangerousness" in violation of Arizona sentencing law. (Petition at 15.) The panel correctly rejected that argument.

Petitioner focuses on the panel's discussion of whether Petitioner was prejudiced by the allegedly incomplete sentencing investigation. *Landrigan*, 272 F.3d at 1228–29. In determining whether Petitioner was prejudiced by his attorney's actions, the panel used the proper standard set forth in *Strickland*: whether it is reasonably probable that the additional evidence would have produced a different result at sentencing. *Id.* at 1228. In assessing prejudice in instances where the defendant insists that mitigating evidence not be presented,

(... continued)
Landrigan, 272 F.3d at 1227.

this Court has limited its analysis to the evidence that would have changed the defendant's mind. *See Stankewitz*, 365 F.3d at 722 n. 10; *Douglas v. Woodford*, 316 F.3d at 1089; *Hayes*, 301 F.3d 1070. Guided by this standard, the panel conducted an analysis of the possible prejudice that Petitioner may have suffered because the sentencing court did not consider evidence of his genetic predisposition for violence.

Contrary to Petitioner's argument that the panel improperly converted this information into evidence of "future dangerousness," the panel simply addressed whether the mitigation evidence that Petitioner purportedly would have sanctioned at the sentencing hearing was *actually* prejudicial. The panel acknowledged that the mitigation evidence now proffered by Petitioner could be utilized to argue that Petitioner's "biological background made him what he is." *Landrigan*, 272 F.3d at 1228. But, conversely, the panel also noted that this type of genetic evidence is rather "exotic" and would have allowed the State to rebut the genetic claim with evidence of Petitioner's lengthy criminal history, emphasizing that Petitioner is a remorseless killer, rather than a genetically programmed murderer. *Id.* at 1229. *See* A.R.S. § 13-703(C) ("The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the

circumstances included in subsections F [aggravating circumstances] and G [mitigating circumstances] of this section.”).

The panel properly considered whether it was reasonably probable that the use of the genetic predisposition theory would have produced a different result at sentencing. The panel did not use the mitigating evidence offered regarding Petitioner’s biological and genetic background as evidence of “future dangerousness,” rather the panel determined that, given the facts in this case, it was “highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also.” *Landrigan*, 272 F.3d at 1228–29. The panel did not err when it determined that the sentencing result would not have been affected by this mitigating evidence.

....

....

....

IV

THE DISTRICT COURT'S FINDINGS REGARDING PROCEDURAL DEFAULT ARE NOT REVIEWABLE BY THIS COURT, MOREOVER, *STEWART V. SMITH* DOES NOT PROVIDE RELIEF

Finally, Petitioner seeks review of the district court's findings regarding procedural default. (Petition at 16.) Both this Court and the district court have refused to issue a certificate of appealability on the procedural default issue. This issue has been previously adjudicated and is not before this Court.

Petitioner argued to the district court that he overcame the procedural bar because "the constitutional violations were reviewed by the state supreme court in its fundamental review or independent review of Landrigan's conviction and sentence." (Petition at 16.) Petitioner's contention that the Arizona Supreme Court's former practice of conducting a "fundamental error" review constitutes "fair presentation of any and all possible federal constitutional claims, so that any federal claims later raised have "been fairly presented" and properly exhausted, has been expressly rejected by this Court. In *Poland v. Stewart*, 117 F.3d 1094, 1105–06 (9th Cir. 1997), this Court held that the "fundamental error" review of the Arizona Supreme Court does *not* constitute a "fair presentation" of an issue to that court. Therefore, there is no basis for this Court to grant review on this issue.

In a variation of the above assertion, Petitioner also claims that the Arizona Supreme Court's "independent review" of death sentences constitutes "fair presentation" of any and all possible federal constitutional claim. However, Petitioner made no such argument in the district court and, therefore has waived this Court's consideration of the argument on appeal.

Moreover, Petitioner misrepresents the nature and scope of the Arizona Supreme Court's "independent review" of death sentences. The Arizona Supreme Court conducts an "independent review of aggravating and mitigating factors in all capital cases to determine whether the death penalty is warranted." *State v. Rogovich*, 932 P.2d 794, 799–800 (1997); *see also Poland*, 117 F.3d at 1100. This includes an independent weighing of the aggravating and mitigating circumstances "to determine whether the former outweighs the latter and warrants imposition of the death penalty." *State v. Wood*, 881 P.2d 1158, 1173 (1994). It does not include a legal analysis of federal constitutional claims. The independent review is simply a *de novo* review and weighing of the aggravating and mitigating circumstances. *E.g. State v. Kiles*, 857 P.2d 1212, 1223 (1993); *State v. Johnson*, 710 P.2d 1050, 1055 (1985). Thus, the Arizona Supreme Court's independent review and weighing of aggravating and mitigating circumstances cannot possibly satisfy the "fair presentation" requirement regarding federal constitutional claims.

On the date that Petitioner filed his petition for rehearing and rehearing *en banc*, the United States Supreme Court had recently granted certiorari in *Smith (Robert) v. Stewart*, 534 U.S. 157 (2001). Petitioner argued that the resolution of *Smith* may have an impact on his case. (Petition at 17.) Petitioner is incorrect.

In a motion for Limited Remand and Stay and Abeyance, filed on March 29, 2001, Petitioner asked to have this case remanded to the district court in light of this court's decision in *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001). Petitioner asserted that the three claims found procedurally defaulted by the district court had been "fairly presented" to the Arizona Supreme Court on *direct appeal* because, although Petitioner did not raise federal constitutional claims in his brief to the state supreme court, the Arizona Supreme Court's "fundamental error" review properly exhausted the claims. (Petitioner's Motion for Limited Remand, Appendix at 13–14, 18–19, 23–24, 29.) Petitioner did *not* allege that the Arizona Supreme Court's "independent review" of the propriety of his death sentence satisfied the exhaustion doctrine. (*See Id.*)

Neither this Court's holding in *Smith* nor the subsequent reversal of that case by the United States Supreme Court in *Stewart v. Smith*, 536 U.S. 856 (2002), applies in this instance. Petitioner is conflating "exhaustion/fair presentation" (the adequacy of his own efforts to place federal constitutional

issues before the state court) with the adequacy of a state court's application of a procedural bar to federal constitutional claims (the issue in the *Smith* case). Because the United States Supreme Court's decision in *Smith* does not deal with the issues raised by Petitioner, *Smith* affords no basis for this Court to grant review on this issue.


CONCLUSION

The grounds raised by Petitioner in his petition are meritless. Therefore, the petition for rehearing and rehearing *en banc* should be denied.

RESPECTFULLY SUBMITTED,

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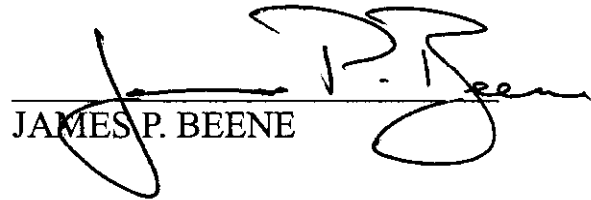


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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,367 words.



JAMES P. BEENE

No. 9TH CIR. DOCKET NO. 00-99011

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN,

PETITIONER-APPELLANT,

-VS-

DORA B. SCHRIRO, et al.,


RESPONDENT-APPELLEE.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA,
No. CIV-96-02367-PHX-ROS
STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

DATED this 20th day of December, 2004.

TERRY GODDARD
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